IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 863 OF 2002

1. Dnyaneshwar Narhari Dhone,

2. Shashikant Narhari Dhone. ... Appellants.

V/s.

1. Umakant Vasantrao Gita,

2. Smt.Vimal Balkrishna Kanady,

3. Smt.Kamal Vasant Chougule,

4. Smt.Ashalata Yeshwant Karande. ... Respondents.

V.A.Thorat, senior counsel with G.S.Bhat for the appellant.

A.A.Kumbhakoni for the respondents.

CORAM : V.C.DAGA, J.

RESERVED ON : 12th August 2004.

PRONOUNCED ON: 3rd September 2004.

JUDGMENT :

. This appeal from order is directed against the order dated 8th August, 2002 passed below Exh.5 in Special Civil Suit No.472 of 2002 by the 2nd Joint Civil Judge, Senior Division, Pune granting injunction under order 39 rules 1 and 2 and thereby restraining defendant Nos.1 and 2 from changing the nature of the suit property or making any kind of construction or creating any

right, title or interest in favour of third party in any manner whatsoever till disposal of the suit.

Facts :

. The facts giving rise to the present appeal are as under:

2. The respondent No.1/ original plaintiff filed suit for partition in respect of plot of land admeasuring 631.3 sq.mtrs. bearing C.T.S.No.128 with building structure, godown etc. standing thereon, situated at Kasaba Peth, Pune (hereinafter referred to as "suit property" for short). In the said suit plaintiff/ respondent No.1 also prayed for injunction restraining appellants/ original defendant Nos.1 and 2 from demolishing the structures standing thereon and/or developing the suit property in any manner whatsoever.

3. The appellants and the respondents are the grand children of one late Shri Shivram Dhone, who died some time in the year 1949 leaving behind Smt.Godavari Shivram Dhone, widow; Shri Narhari Shivram Dhone; son, and Smt.Savitribai Vasantrao

Gite, a married daughter. The appellants are the sons of late Shri Narhari Dhone. The respondents are the children of Smt.Savitribai Vasantrao Gite.

4. The respondent No.1/ plaintiff, in the suit for partition, has claimed 1/8th share in the suit property. It is the case of the plaintiff that late Shivram Dhone was doing business and from that income he purchased suit property in the year 1946 in the name of Shri Narhari Shivram Dhone and thereafter, continued to carry on the said business therein. It was, thus, contended that Narhari Shivram Dhone was not the sole owner of the suit property.

5. In 1952 Shri Shivram Dhone and in 1992 Smt.Godawari Shivram Dhone died intestate. Shri Narhari Dhone died in 1996 leaving behind Deed of Will executed by him. It was contended by the plaintiff that the properties and business belonged to late Shivram Dhone and on his death Smt.Savitribai Vasantrao Gite and Shri Narhari Dhone, father of the appellants, both became entitled to a share in ratio of 50 : 50 in the suit property. Plaintiff, thus, claimed 1/8th share in the suit property.

6. It is alleged that appellants/ defendant Nos.1 and 2 started demolishing suit premises with a view to develop the suit property without any notice to respondent No.1/ plaintiff. Respondent No.1/ plaintiff, therefore, filed present suit and also sought ad-interim relief in terms of Exh.5. The appellants/ original defendant Nos.1 and 2 filed their reply to oppose application (Exh.5) for interim relief.

7. It was the contention of the appellants that the suit property was a self acquired property of late Shri Narhari Dhone. The building comprising of ground plus four storeys was constructed in the year 1952-53 by late Shri Narhari Dhone much after the death of late Shri Shivram Dhone. Narhari had let out the suit premises to various tenants independently. He was collecting rent from the tenants. It was, thus, denied that the suit property was ancestral one belonging to late Shivram Dhone and that it was purchased from alleged income derived from the alleged ancestral family business. It was further contended that Savitribai Vasantrao Gite, mother of the respondents was married in 1938, whereas Shivram Dhone expired in the year 1949; as such even Savitribai Gite was not entitled to claim any

share in the suit property. That Narhari Dhone was solely entitled to the estate of deceased Shivram Dhone, if any.

8. It was further contended that Narhari Dhone was the sole owner right from inception. His name stood recorded in all the Government and Municipal records. Late Narhari Dhone has left will dated 18th March, 1991; whereby he has bequeathed the suit property in favour the appellants/ defendant Nos.1 and 2. The suit property is thus absolute property of the appellants. It was further contended that the building has already been demolished by the Developers, who are not made party to the suit as such suit is not tenable in absence of necessary party and the same is liable to be dismissed.

9. Appellants/ defendant Nos.1 and 2 also contended that the suit is barred by law of limitation. Alternatively, appellants have also claimed that Shivram Dhone and the appellants have become owners by adverse possession as such plaintiff has no right to claim any share in the suit property.

10. The trial Court after hearing the parties to the interim application (Exh.5) was pleased to pass an order dated 8th August, 2002 granting interim relief in terms of the impugned order and thereunder injuncted the appellants/ defendant Nos.1 and 2 from proceeding with the construction on the suit property. This order is a subject matter of challenge in the present appeal from order.

Submissions :
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11. Learned counsel for the appellants submits that in law there is no presumption of Joint Hindu Family or that all properties of Hindus are ancestral. That no nucleus from joint family properties has been established by respondent No.1/ plaintiff. According to him, Savitribai Gite was married in 1938, whereas Shivram Dhone expired in the year 1949 as such; even otherwise, in law, Smt.Savitribai was not entitled to any share in the suit property.

12. Learned counsel for the appellants further submits that no documentary evidence was produced by the plaintiff to show that the suit property was purchased by late Shri Shivram Dhone

in the name of late Shri Narhari Dhone from the joint family income. Merely filing of affidavits of some persons claiming acquaintance with late Shivram Dhone, was not sufficient to hold that the suit property was joint family property. He submits that the four storeyed building was constructed by late Shri Narhari Dhone. It was let out by him on rental basis and that at no point of time any claim was set up by late Savitribai Gite during her lifetime. He submits that all the documents in respect of the suit property were standing in the name of late Narhari Dhone and now they are in the name of present appellants/ defendant Nos.1 and 2. That the will executed by late Narhari Dhone also shows that the suit property belonged to him exclusively.

13. Learned counsel for the appellants further submits that by the time suit was filed, the building was already demolished by the Builder and Developer. The Developer has not been joined as party to the suit though he is a necessary party. He submits that the respondents are not entitled to any share in the suit property since late Smt.Savitribai Gite herself had no share in the property. Lastly, he submits that the trial Court has not taken into consideration all

necessary documents while passing impugned order and, therefore, the impugned order is liable to be quashed and set aside.

14. Per contra, Shri Kumbhakoni, learned counsel for the respondents submits that the impugned order passed by the trial Court is a reasoned order which takes into account all the facts and circumstances of the case. That the view taken by the trial Court is a reasonable and possible view as such the impugned order need not be disturbed. That Shivram Dhone had expired in the year 1949 i.e. after coming into force the Hindu Women's Right to Property Act, 1937 in general and section 3 thereof in particular; whereunder the surviving widow was entitled to have a share equal to that of her son. As such, in the present case, Godavari, widow of late Shri Shivram Dhone would get 1/2 share. Godavari having expired in the year 1989, her daughter Savitribai Gite would be entitled to 1/4th share. That Savitribai having expired in the year 1992, leaving behind the respondents as her legal heirs, the respondents would be entitled to 1/16th share in the suit property.

15. In rejoinder, learned counsel for the appellants while challenging the submissions made by Shri Kumbhakoni, without prejudice to his contentions submitted that in order to protect the interest of the respondents, appellants would be ready to deposit Rs.1 lakh in cash in the trial Court within one month from today with further undertaking not to create encumbrances of any nature either by way of sale or transfer or mortgage or by way of any lien or licence or tenancy in respect of one flat bearing No.203 located on the second floor, admeasuring about 550 sq.ft. (saleable area) in the building to be constructed on C.T.S.No.128, Kasaba Peth, Pune. The appellants also produced a map along with their affidavit demarcating therein the portion of the flat to be kept reserved without any encumbrance so as to enable the trial Court to pass appropriate decree in the event suit is to be decreed. He submits that the entire construction project need not be stalled. That the injunction order, if allowed to operate during the pendency of the suit, which is bound to take considerable time for decision, by that time the project cost might run beyond the estimated cost and, ultimately, the appellants would suffer irreparable loss. In his submission, if the

proposal given is accepted, then interest of the plaintiff can be secured adequately.

Consideration :
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16. Having considered rival submissions and having examined the impugned order, the trial Court has not considered prima facie case and/or balance of convenience and/or injury which the parties may suffer on account of grant of interim injunction. The trial Court has merely brushed aside all the arguments in one paragraph i.e. para-8 of the impugned order stating therein that prima facie case and balance of convenience lies in favour of the plaintiff and that, if no injunction is granted, the plaintiff would suffer irreparable loss. Trial Court neither discussed evidence or material in support of its finding nor given any cogent reason in support of its order. The impugned order nowhere takes into account rival submissions. No findings are recorded with respect to any of the ingredients of order 39 rules 1 and 2 of C.P.C. or with respect to the merits of rival submission. The impugned order is a casual and perfunctory order.

17. The suit is still pending for trial. The disputed facts will have to be thrashed out on the basis of the evidence to be led by the parties. Under these circumstances, grant of injunction to prevent defendant Nos.1 and 2 from proceeding with the construction and injuncting them from completing their project would result in heavy financial loss to the appellants/ defendant Nos.1 and 2. The fast rise in construction cost cannot be ignored. This Court can very well take judicial notice of the rising cost of construction. The respondent No.1/ plaintiff may not be in a position to furnish security for the possible loss which the appellants may suffer, if their project is stalled. In the circumstances, I do not think this a case wherein trial Court was justified in granting absolute injunction and preventing appellants/ defendant Nos.1 and 2 from proceeding with the construction without considering day to day rise in construction cost that too without considering the question of security to secure the interest of the appellants. As such impugned order is unsustainable. However, considering the submissions made by learned counsel appearing for the appellants and the affidavit filed on record along with the proposal incorporated therein, it can be accepted without

prejudice to the rights of either of the parties to the appeal. As such affidavit filed and the statements made therein are taken on record. It is made clear that the undertaking given shall be subject to the result of the suit. It would be open for the trial Court to take into account the undertaking given by the appellants and to pass appropriate order in its own discretion at the time of final disposal of the suit either to permit appropriation or release of the amount including an order with respect to the flat and/or allotment thereof in favour of the plaintiff in lieu of his share with any other suitable order as the contingency may demand keeping interest of justice in mind.

18. In the above premise, appellants are directed to deposit sum of Rs.1 lakh with the trial Court within one month from today. Appellants are further directed not to create any encumbrance of whatsoever nature by way of sale, transfer, mortgage, lien, licence or tenancy in respect of flat No.203 located on the second floor admeasuring 550 sq.ft. (saleable area) in the building to be constructed on C.T.S.No.128, Kasaba Peth, Pune more particularly described in the map annexed to the undertaking given by the

appellants. The undertaking dated 11th August, 2004 duly signed by Shri Dnyaneshwar Narhari Dhone and Shri Shashikant Narhari Dhone, the appellants herein along with map shall form part of this order.

. Appeal stands allowed and disposed of in terms of this order with no order as to costs.

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